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No. 758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RONALD E. GATES,
Petitioner,

v.

P. F. COLLIER, INC., a Delaware Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Proceedings to Date

Petitioner applies for a writ of certiorari. Respondent opposes on the ground that the record here presents no question of sufficient importance to justify review by this Court.

After ten days of trial, the United States District Court for the District of Hawaii (Martin Pence, C.J.) awarded respondent P. F. Collier, Inc. judgment of $306,676.25 on counterclaims for fraud, breach of fiduciary duty and breach of contract, and dismissed petitioner's claim for commissions.

Petitioner appealed on the same issues he reargues here. The Ninth Circuit entered judgment affirming the District Court's judgment. Thereafter the Ninth Circuit denied petitioner's petition for rehearing.

The Facts

Facts relevant to the petition are set forth in the decision of Chief Judge Martin Pence at 256 F. Supp. 206-210; D1-D24. The Ninth Circuit refused to set aside the findings of fact. 378 F.2d 889; A1-A16.

A brief outline of the facts out of which this controversy arose:

(1) About 1953, petitioner began selling respondent's books in Japan, purchasing the books outright from respondent Collier under an arms-length buyer-seller arrangement (Tr. 251-252, 737). On April 15, 1960 petitioner Gates entered into a personal contract with Collier whereby Gates was appointed Collier's Far Eastern sales supervisor with headquarters in Tokyo (PX 1; Tr. 201, 202). Again on September 15, 1961 Gates and Collier entered into a substantially similar contract (PX 2).

(2) Gates' duties under these agreements were to recruit, train, maintain and supervise a book sales organization to sell respondent's books, collect accounts and supervise book sales (PX 1, PX 2).

(3) Orders obtained by Gates were to be forwarded to Collier in New York for acceptance there (Tr. 82, 203-204, 209). All monies received from sales to Japanese civilians and schools were to be deposited by Gates in Collier's account in the First National City Bank, Tokyo branch (Tr. 80, 143, 206, 800-801, 1013). All dollars received from American military personnel were to be sent directly to New York (PX 6; Tr. 119). Gates had no discretion to withhold Collier money (Tr. 800-801).

(4) Gates was to receive 34% of the net sales price of all orders accepted, and if 50% of the purchase price was paid within 15 months after acceptance of an order by Collier, Gates was entitled to 7% more (PX 1, PX 2, PX 9; Tr. 17, 96, 98, 110, 113, 157-158, 174, 227, 325-326, 407). If the gross sales during a twelve-month period from the date of the contract or in any successive twelve-month period exceeded $1,000,000, Gates was entitled to 2% more, but if gross sales were between $500,000 and $1,000,000 during such period, then Gates would receive 1% of 2% (Tr. 99, 126). For cash sales, Gates was allowed to give to the purchaser a 5% discount or keep 5% himself (Tr. 114, 121, 227, 283, 409).

(5) Collier anticipated a loss of 12.5% on the total amount of accepted orders (PX 1, PX 2, PX 9). On 24-month contracts, a monthly loss analysis would be made 30 months from the month the orders were reported; on 12-month contracts, such an analysis would be made 15 months from the time the orders were reported (Tr. 99, 110, 115, 379, 385, 399, 430, 435, 437, 466). If the losses were below 12.5%, Gates would receive the difference between that figure and the actual percentage loss ratio incurred; if the actual loss ratio exceeded 12.5%, Gates was to pay to Collier the difference between 12.5% and the actual percentage of loss over that figure (Tr. 379, 385, 399, 466).

(6) Collier agreed to ship books at its expense to Gates in Tokyo for sale to Japanese civilians and schools (PX 9; Tr. 15-16, 108-109). All orders to military personnel were to be shipped to the purchasers by Collier's New York office (PX 9; Tr. 123-124). Gates was to pay all branch operational expenses (PX 9). All accounts sold by Gates in Japan were to be accounts receivable of Collier (PX 9; Tr. 195, 196, 201, 227, 278).

(7) Books sold to Japanese civilians and schools were imported into Japan under import licenses issued to Collier by the Japanese Government (Tr. 15-16) and collections in yen were deposited in Collier's FNCB Tokyo account (Tr. 16). These yen were subsequently converted into U. S. dollars and transmitted to New York under the Japanese import licenses (Tr. 16).

(8) The basic contract between Gates and Collier was negotiated and consummated in New York City (Tr. 9-10; Rec. 3-4, 6, 251).

(9) In April 1962 the collection losses were so great that Norman E. Bennett, then Collier's senior vice-president and now its President, flew to Tokyo to review Gates' operations (Tr. 541, 746-748, 794). Bennett discovered that Gates had been systematically embezzling Collier money (Tr. 563, 753, 770, 814, 999, 1027, 1077). Gates had been reporting money collected only in a selective manner—he would report to Collier the cash sales to Japanese civilians as having been installment sales, thus taking for his own use not only the full amount of his commissions but also that portion of the sales price immediately due Collier (DX B-13—A, B, C; Tr. 558, 812). Gates also set up a system of double books and dummy purchasers to camouflage the fraud from detection by Collier and its auditors (PX 101; DX B-13—A, B, C; Tr. 603, 610, 612, 618, 637, 814).

(10) Gates admitted to Bennett and the auditor Van Arsdale that he had engaged in the fraudulent scheme because he needed cash (Tr. 755, 779, 815). He promised to repay Collier from property he owned in Japan (Tr. 755-757, 815, 1160). A few days later Gates recanted, denying generally that he had done anything wrong (Tr. 566-567, 758). On May 2, 1962 Gates was discharged by Bennett pursuant to authorization from Collier's board of

directors (DX B-16, DX B-17, DX B-19; Tr. 21, 166, 172, 759-762).

(11) On June 8, 1962 Gates filed an affidavit with a Tokyo district court claiming that Collier owed him over $132,000 for commissions, that he had not been properly discharged and that he was still Collier's representative in Japan (Ct. Ex. A, DX G-1, G-34-A; Tr. 181, 804, 947, 1015-1037). This affidavit was filed in support of an application for an ex parte injunction restraining Bennett (and another Collier officer, Superintendent Simon Nork) from interfering with Gates' business as Collier's alleged representative in Japan (*ibid.*). On Gates' misrepresentations an ex parte order was issued (*ibid.*). Gates then proceeded to sell 251 sets of encyclopedias (which Collier had previously shipped him) without remitting any money to Collier (Tr. 947).

(12) In 1963, Gates left Japan for Hawaii, and in July 1964 filed this diversity action in the District Court in Honolulu for an accounting of commissions assertedly due him, claiming that Collier somehow owed him $367,000 under the 1960 and 1961 contracts (Rec. 1-5, 696). Collier then counterclaimed, charging Gates with fraud, breach of fiduciary duty and breach of contract (Rec. 27-33).

Petitioner Gates has not shown that these findings present any "special and important reasons" to grant a writ; he simply reargues the merits of a case thoroughly tried and reviewed below. REVISED RULES, RULE 19(1), 388 U. S. 948 (1967).

The Claims for Relief

In the Trial Court, petitioner sought an adjudication that his discharge by respondent Collier was illegal and that commissions were due him. He also sought a dismissal of the counterclaims.

Questions Presented

In this Court, petitioner urges ten grounds for granting certiorari. All these arguments were made to the Ninth Circuit which unanimously affirmed the Trial Court.

Basically, petitioner asks for a writ on two primary grounds and several secondary grounds. All are plainly without merit. They are:

(a) The contract between petitioner and respondent violated the Japanese Foreign Exchange Law, thereby raising a question affecting United States foreign relations.

(b) The Trial Court erred in certain findings and conclusions with regard to the contract which were affirmed by the Ninth Circuit.

(c) The Trial Court, as affirmed by the Ninth Circuit, adopted an erroneous conflict of laws rule and applied the wrong law to this case.

(d) The Trial Court, as affirmed by the Ninth Circuit, erred in awarding respondent some counsel fees and travel expenses as special costs.

ARGUMENT

CERTIORARI SHOULD BE DENIED.

A. No Issue Affects Foreign Relations: The Foreign Exchange and Foreign Trade Control Law of Japan.

Petitioner urges that the contract between him and respondent somehow violated the Japanese Foreign Exchange Law, was conceived by him and respondent for illicit purposes, and is unenforceable (Pet. 2-3, 13-17, 19-36). After full inquiry, the District Court held that "this Court cannot find that the contract was illegal and void" since "plaintiff [petitioner] has not proved the judicial interpretation and legal effect of the Japanese law to the particular facts of this case." 256 F. Supp. 214. Squarely presented with this question on appeal, the Ninth Circuit agreed. 378 F. 2d 889.

What remains is simply petitioner's failure to show the Trial Court the meaning and application of a foreign statute upon which he purports to rely. Accordingly, no important substantive question of law is raised, and since the Trial Court did not construe or apply the Japanese law or question its validity, there is no issue for review bearing on United States foreign relations. (Pet. 19; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 407 (1964).)

Petitioner's other ground for urging the illegality of the Japanese civilian personnel portion of his contract with respondent is his notion that a part of every $172.50 per set of encyclopedias sold which respondent sent out of Japan represented commissions of petitioner, and that

respondent's transfer of these assets out of Japan constituted a transfer of petitioner's claimable assets and a violation of the Japanese Foreign Exchange Law (Pet. 13-15, 19-27). The Trial Court's rejection of this contention was based on two findings of *fact:* first, that respondent obtained from the Japanese Government the proper authorization to send $172.50 per set out of Japan; second, that petitioner failed to prove as a fact that any part of the $172.50 remittances was not part of respondent's cost or cost plus profit per set but rather petitioner's own commissions. 256 F. Supp. 207, 211-212. The Ninth Circuit held that there is in the record "nothing to indicate that this finding of fact of the trial court was inaccurate or erroneous." 378 F. 2d 889-890.

There is no reason to review these questions of fact already decided by the Trial Court and carefully reviewed below. See, Mr. Justice Harlan, MANNING THE DIKES: SOME COMMENTS ON THE STATUTORY CERTIORARI JURISDICTION AND JURISDICTIONAL STATEMENT PRACTICE OF THE SUPREME COURT OF THE UNITED STATES, 13 RECORD, ASSOC. BAR CITY N. Y. 541, 549-553 (1958).

B. The Trial Court's Rulings on Contract Law Should Not be Disturbed.

For the same reasons, petitioner's other contentions with respect to his contract with respondent provide no basis for a grant of certiorari (Pet. 3, 53-71). Petitioner merely argues that the *evidence* of record is insufficient to sustain the Trial Court's judgment for respondent on its counterclaim. Petitioner insists that the Trial Court should have made the following findings of *fact:* (a) that the contract between petitioner and respondent was divisible; (b) that petitioner did not defraud respondent; (c)

assuming petitioner's fraud, that respondent did not suffer loss as a proximate result; and (d) that respondent rescinded the contract upon which it later counterclaimed.

The Trial Court found against petitioner on all of these factual issues, 256 F. Supp. 208-209, 210-211, 214, and the Ninth Circuit, after extensive written and oral argument, discovered no error in the findings. 378 F. 2d 889, 890-891, 896. There is no reason shown for a review of these fact issues by this Court.

Petitioner's claim (Pet. 3, 36-39) that he is entitled to recover in *quantum meruit* for respondent's unjust enrichment is a factual question of accounting which, on the calculations most favorable to petitioner, was nevertheless resolved against him. 256 F. Supp. 214. The Ninth Circuit affirmed with the comment, "The findings show that there are *no facts* upon which an unjust enrichment could be calculated." 378 F. 2d 896 (italics added).

C. Applicable Law.

Petitioner contends (Pet. 17-18, 39-51) that the Trial Court, as affirmed by the Ninth Circuit, applied a wrong conflict of laws rule in this case and thus erroneously concluded that New York, and not Japanese, law applied to the issues of petitioner's fraud and embezzlement. But the Ninth Circuit held that regardless of the conflict of laws rule followed by the Trial Court—the older "lex loci" theory or the newer "center of gravity" theory—the Trial Court was correct on the record before it to apply New York law to the issues involved. 378 F. 2d 892-895. The trial and appellate Courts below rendered no decision on conflict of laws departing from established rules and made no choice between "lex loci" and "center of gravity". There is here no special and important question for review.

D. Allowance of Some Attorneys' Fees and Travel Expenses as Special Costs.

Petitioner seeks review on the ground that the Trial Court erred in awarding respondent as special costs some attorney's fees and travel expenses respondent reasonably and necessarily incurred as a proximate result of petitioner's fraud (Pet. 4, 18-19, 71). But in *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*, 209 F. 2d 467, 476 (9th Cir. 1953), the Ninth Circuit held that

> "The allowance of costs, including attorneys' fees, is a matter within the discretion of the trial court and will not be disturbed unless an abuse of that discretion is clearly shown."

The case relied on by petitioner, *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 (1967), is plainly limited to the question of allowances of attorneys' fees under the Lanham Act. This Court therefore should not concern itself with what would be essentially a second review of a carefully considered discretionary ruling of the Trial Court.

In allowing the attorneys' fees to respondent, the Trial Court found that petitioner obtained by fraud a restraining order against respondent from a Japanese court. This was simply a finding of fact on which the Trial Court based an allowance to respondent of attorneys' fees for litigation in Japan as well as in Hawaii. 256 F. Supp. 215-216. Despite petitioner's assumption (Pet. 3, 18, 51-53), there is in fact no challenge or disregard of a judgment of the courts of a foreign sovereign state. Accordingly, no ground exists here for asserting jurisdiction.

E. Ninth Circuit Dicta.

Petitioner's contentions as to the Ninth Circuit's comments on Article XIX of the Japanese-American Status of Forces Treaty and the substantive Japanese law of mandate (Pet. 17, 30-31, 48-49; 378 F. 2d 890, 891) are likewise without merit. The Ninth Circuit's remarks clearly are dicta and cannot be considered rulings on a treaty and foreign statute necessitating this Court's review.

Conclusion

This case was decided in accordance with established legal principles, no federal question of substance is presented, no conflict of decisions exists, and no questions are presented here of sufficient importance to justify or warrant exercise of this Court's power of supervision.

Certiorari should therefore be denied.

Respectfully submitted,

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Of Counsel.

Dated: November 21, 1967.

Appearance and Certificate of Service

I, Peter Megargee Brown, a member of the Bar of the Supreme Court of the United States and attorney for respondent P. F. Collier, Inc. in the above-entitled proceeding, do hereby appear for said respondent in this proceeding and certify, pursuant to Revised Rule 33(1) and (3b) of this Court, that three copies of the within Brief for Respondent in Opposition have been served upon each of the attorneys for the petitioner herein, the only party required to be served, by depositing the same in the United States Post Office this 22nd day of November, 1967, with air mail postage prepaid and addressed as follows:

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